Supreme Court, U.S.
FILED
07-904 JAN 4 - 2008
OFFICE OF THE CLERK

79

No. _____

IN THE

Supreme Court of the United States

CHARLES THOMAS CLAYTON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Lowell H. Becraft, Jr.
Counsel of Record for Petitioner
403 Andrew Jackson Way
Huntsville, Alabama 35801
(256) 533-2535

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

Whether the Consumer Price Index,[1] which is used to determine the "minimum filing requirement" amount for the filing of federal income tax returns, is a "rule" for Administrative Procedures Act purposes and is consequently void if not duly promulgated?

---

[1] The petition for writ of certiorari filed in December, 2007, by Rachel McElhinney also raises an issue concerning the Consumer Price Index.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

STATUTES INVOLVED 1

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE WRIT 10

CONCLUSION 18

APPENDIX

United States v. Clayton, 506 F.3d 405 ..... 1a

United States v. Clayton (U.S. District Court, W.D.Texas, Aug. 2, 2006) 21a

TABLE OF AUTHORITIES

Cases: Page:

Alaniz v. Office of Personnel Management,
728 F.2d 1460 (Fed.Cir. 1984) 9, 15, 16, 18
Appalachian Power Co. v. E.P.A.,
208 F.3d 1015 (D.C.Cir. 2000) 8, 16, 17
Appalachian Power Company v. Train,
566 F.2d 451 (4th Cir. 1977) 8
Batterton v. Marshall,
648 F.2d 694 (D.C.Cir. 1980) 9, 14, 16, 18
Brennan v. Ace Hardware Corp.,
495 F.2d 368 (8th Cir. 1974) 8
Christensen v. Harris County,
529 U.S. 576 (2000) 18
Coalition for Common Sense in Government Procurement v. Secretary of Veterans Affairs,
464 F.3d 1306 (Fed.Cir. 2006) 8
Coliseum Square Ass'n., Inc. v. Jackson,
465 F.3d 215, 229 (5th Cir. 2006) 8, 9
Dufresne v. Baer,
744 F.2d 1543 (11th Cir. 1984) 8
First Family Mortgage Corp. v. Earnest,
851 F.2d 843 (6th Cir. 1988) 8
Gatter v. Nimmo,
672 F.2d 343 (3rd Cir. 1982) 8
Hoctor v. U.S. Department of Agriculture,
82 F.3d 165 (7th Cir. 1996) 8
Kwon v. INS,
646 F.2d 909 (5th Cir. 1981) 8
Lynch v. United States Parole Com'n.,
768 F.2d 491 (2nd Cir. 1985) 8

Phillips Petroleum Co. v. Johnson,
22 F.3d 616 (5th Cir. 1994) 8, 18
Ramey v. Reinertson,
268 F.3d 955 (10th Cir. 2001) 8
Senn Park Nursing Center v. Miller,
104 Ill.2d 169, 470 N.E.2d 1029 (1984) 13, 14
United States v. Bowers,
920 F.2d 220 (4th Cir. 1990) 7
United States v. Harvey,
659 F.2d 62 (5th Cir. 1981) 8
Western Radio Servs. Co. v. Espy,
79 F.3d 896 (9th Cir. 1996) 8

Statutes:

5 U.S.C. §551 ..... 2, 10, 13
26 U.S.C. §1 ..... 3, 4, 11
26 U.S.C. §151 ..... 3, 6
26 U.S.C. §6001 7
26 U.S.C. §6011 7
26 U.S.C. §6012 ..... 2, 6, 7
26 U.S.C. §7203 ..... 5, 7
26 U.S.C. §7206 5
28 U.S.C. §1254 1

PETITION FOR A WRIT OF CERTIORARI

Petitioner Charles Thomas Clayton, M.D. ("Clayton") respectfully petitions for a writ of certiorari to review a judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the court of appeals, App., *infra*, 1a, is reported at 506 F.3d 405. The opinion of the district court, App., *infra*, 21a, is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 29, 2007. App., *infra*, 1a. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

This petition concerns the definition of "rule" as set forth in the Administrative Procedures Act, and the relevant law provides in pertinent part as follows:

> "For the purpose of this subchapter -
>
> *****
>
> "(4) 'rule' means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice

> requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing;"

5 U.S.C. § 551.

This petition also concerns the requirement to make a federal income tax return, and the relevant law provides in pertinent part as follows:

> "(a) General rule.
> "Returns with respect to income taxes under subtitle A shall be made by the following:
> "(1)(A) Every individual having for the taxable year gross income which equals or exceeds the exemption amount, * * * "
>
> ****
> "(D)(ii). The term 'exemption amount' has the meaning given such term by section 151(d)."

26 U.S.C. §6012.

The above section of the 1986 Internal Revenue Code references and is dependent on §151(d)(4), that provides in pertinent part as follows:

> "(4) Inflation adjustments.
> "(A) Adjustment to basic amount of exemption.
> "In the case of any taxable year beginning in a

calendar year after 1989, the dollar amount contained in paragraph (1) shall be increased by an amount equal to –

"(i) such dollar amount, multiplied by

"(ii) the cost-of-living adjustment determined under section 1(f)(3) for the calendar year in which the taxable year begins, by substituting 'calendar year 1988' for 'calendar year 1992' in subparagraph (B) thereof."

26 U.S.C. §151.

Section 151(d)(4) is dependent on the above referenced §1(f)(3), which provides as follows regarding calculation of the above mentioned "cost-of-living adjustment":

"(3) Cost-of-living adjustment.

"For purposes of paragraph (2), the cost-of-living adjustment for any calendar year is the percentage (if any) by which –

"(A) the CPI for the preceding calendar year, exceeds

"(B) the CPI for the calendar year 1992.

"(4) CPI for any calendar year.

"For purposes of paragraph (3), the CPI for any calendar year is the average of the Consumer Price Index as of the close of the 12-month period ending on August 31 of such calendar year.

"(5) Consumer Price Index.

"For purposes of paragraph (4), the term 'Consumer Price Index' means the last Consumer Price Index for all-urban consumers

published by the Department of Labor. For purposes of the preceding sentence, the revision of the Consumer Price Index which is most consistent with the Consumer Price Index for calendar year 1986 shall be used."

26 U.S.C. §1(f)(3).

STATEMENT OF THE CASE

1. Introduction.

This petition presents a crucial question affecting not only the federal government but also the American public. It concerns the method by which the rate of inflation, the Consumer Price Index ("CPI"), is determined. Presently, the CPI is calculated by the Department of Labor ("DoL") and this calculation directly and indirectly affects hundreds of millions of people as well as the budget of the federal government itself. However, the American public, including any interested economist or statistician, plays no role in the determination of any CPI. Instead, for all that is known regarding the actual process by which the DoL determines any CPI, it is calculated in the hidden backrooms of government buildings by unelected bureaucrats.

Dr. Clayton's petition directly raises the question of the legal validity of the DoL's calculation of the CPI. While this issue is raised solely in the context of the CPI's relationship to the requirement to make federal income tax returns, it is undeniable that this question is vastly broader than this context. Dr. Clayton contends that the determination and publication of the CPI by the DoL, which affects both

the American public and the federal government, must be adopted via the procedures mandated by the Administrative Procedures Act ("APA"), if any CPI is to be accorded the force and effect of law.

2. Factual Background.

Prior to indictment, Dr. Clayton was a Texas radiologist who practiced in Houston. Generally, through the years up to and through 1998, Dr. Clayton filed federal income tax returns and reported what he made from his medical practice on those returns. However starting in 2000, he commenced a study of the Internal Revenue Code, and that study lead him to conclude that he was not required to either file income tax returns or pay income taxes. He thereafter ceased filing income tax returns for the years 1999 and following. In 2001 and 2002, he filed returns to amend his previously filed tax returns for the years 1997 and 1998, and claimed therein that his income for these two years was "zero." These actions lead to his indictment. See App., *infra*, 2a – 3a.

On April 4, 2006, a federal grand jury sitting in the Western District of Texas at Austin returned an 8 count indictment against Dr. Clayton. Counts 1 and 2 thereof charged violations of 26 U.S.C. §7206(1), and alleged that on April 10, 2001, Dr. Clayton filed a false, Form 1040X federal income tax return to amend his previously filed tax return for the year 1997 (count 1), and that on April 6, 2002, Dr. Clayton filed a false, Form 1040X federal income tax return to amend his previously filed tax return for the year 1998 (count 2). Counts 3 through 8 charged violations of 26 U.S.C. §7203 and asserted that for the tax years 1999 through 2004, Dr. Clayton had willfully failed to filed federal income tax returns.

On June 30, 2006, Dr. Clayton filed a motion to dismiss counts 3 through 8 of the indictment, which charged willful failure to file federal income tax returns. In this motion, Dr. Clayton asserted that the requirement to make federal income tax returns is governed by 26 U.S.C. §6012, which in turn relies upon 26 U.S.C. §151(d) for determination of the minimum, threshold filing requirement amount (the "exemption amount" in the terms of the statute). Dr. Clayton noted in his motion that since 1990, this minimum filing requirement amount has been indexed to the rate of inflation, the CPI, but there is nothing in either the tax code itself or relevant tax regulations that sets forth that amount for any year since 1990. Since an element of a willful failure to file a tax return case concerns the requirement to file such returns, and since the threshold filing requirement amount is not established by law, Dr. Clayton asserted that these counts of the indictment should be dismissed as a matter of law.

The prosecution's reply to this motion was short, and its primary argument was set forth in a footnote in its brief: "To determine one's exemption amount, a taxpayer has the choice of (1) reading the Form 1040 and/or the accompanying instructions for the pertinent tax year, both of which explicitly state the exemption amount for the various filing statuses, or (2) going through the more complicated process of cross referencing the statutes, regulations, and the consumer price index to calculate the same number referenced in option one. Either way, the taxpayer can accurately determine the threshold filing requirement for any given year." The prosecution concluded its reply to Dr. Clayton's motion with the argument that "[w]hether the exemption amount is enumerated in a code or

regulation is irrelevant to defendant's argument that he is not required to comply with a mere directive, as the exemption amount does not compel the defendant to act – section 7203 does."

3. The District Court's Decision.

On August 2, 2006, the district court denied Dr. Clayton's motion, stating, "[t]he Court agrees with the Government that Defendant could easily have determined the exemption amount triggering the filing requirement in every year at issue by: (1) simply reading the Form 1040 and/or the accompanying instructions for the pertinent tax year, both of which state the exemption amount, or (2) going through the process of cross referencing the statutes, regulations, and the consumer price index to calculate the figure referenced in option one. The statutory requirement to file income tax returns is located in 26 U.S.C. §§ 6001, 6011, and 6012, while § 7203 makes the willful failure to file income tax returns a criminal offense. *See United States v. Bowers*, 920 F.2d 220, 221–23 (4th Cir. 1990) (upholding convictions in a tax evasion case because the federal regulations set forth sufficient advice on how to obtain the forms or information necessary to prepare a tax return). Here, if Defendant had taken the time to follow the cross references within the statutes and regulations, he would have been able to determine the amount of gross income that triggers the duty to file a tax return." See App., *infra*, 22a – 23a.

The problem with the argument asserted by the prosecution and adopted by the district court is that it avoided addressing Dr. Clayton's central point: the CPI constitutes a "rule" for APA purposes and must be adopted accordingly, and this argument offered by the

prosecution simply assumed without question the validity of the CPI. The government has never asserted that any CPI has actually been adopted via APA procedures.

4. The Fifth Circuit's Decision.

On appeal, Dr. Clayton alleged that the district court erred in denying the above mentioned motion to dismiss counts 3 through 8 of the indictment. As to the government's and district court's position that the minimum filing requirement amount (determined via the CPI) could legally be provided by the Form 1040 instruction manuals, Dr. Clayton argued that a wealth of decisional authorities,[2] including *Coliseum Square*

---

[2] See also *Lynch v. United States Parole Com'n.*, 768 F.2d 491, 497 (2nd Cir. 1985); *Gatter v. Nimmo*, 672 F.2d 343, 347 (3rd Cir. 1982); *Appalachian Power Company v. Train*, 566 F.2d 451, 455 (4th Cir. 1977); *United States v. Harvey*, 659 F.2d 62, 64 (5th Cir. 1981); *Kwon v. INS*, 646 F.2d 909, 918 (5th Cir. 1981); *Phillips Petroleum Co. v. Johnson*, 22 F.3d 616, 621 (5th Cir. 1994); *First Family Mortgage Corp. v. Earnest*, 851 F.2d 843, 845 (6th Cir. 1988); *Hoctor v. U.S. Department of Agriculture*, 82 F.3d 165 (7th Cir. 1996); *Brennan v. Ace Hardware Corp.*, 495 F.2d 368, 376 (8th Cir. 1974); *Western Radio Servs. Co. v. Espy*, 79 F.3d 896, 901 (9th Cir. 1996); *Ramey v. Reinertson*, 268 F.3d 955, 963 (10th Cir. 2001); *Dufresne v. Baer*, 744 F.2d 1543, 1549-50 (11th Cir. 1984); *Appalachian Power Co. v. E.P.A.*, 208 F.3d 1015, 1020-21 (D.C.Cir. 2000); and *Coalition for Common Sense in Government Procurement v. Secretary of Veterans Affairs*, 464 F.3d 1306 (Fed.Cir. 2006).

Ass'n., Inc. v. Jackson, 465 F.3d 215, 229 (5th Cir. 2006), precluded such use as a matter of law. In reference to Dr. Clayton's argument that the CPI constituted a "rule" for APA purposes, he relied on two cases from the D.C. and Federal Circuits: *Alaniz v. Office of Personnel Management*, 728 F.2d 1460 (Fed.Cir. 1984), and *Batterton v. Marshall*, 648 F.2d 694 (D.C.Cir. 1980). If the Fifth Circuit had adopted the rule established in *Alaniz* and *Batterton*, it would have held that Dr. Clayton's motion should have been granted and these counts of the indictment dismissed.

Instead, the Fifth Circuit established a new rule at variance with that in *Alaniz* and *Batterton*. The essence of the decision of the court of appeals is contained in a single sentence: "The fact that § 6012 incorporates by reference the CPI, which is compiled and published by an agency of the DOL, does not cause the APA to be invoked. In this context, the CPI is simply an ascertainable numerical standard, and there is no requirement that such a standard incorporated into a statute be itself an enforceable rule of law." App., *infra*, at 7a – 8a.

The courts in *Alaniz* and *Batterton* have concluded that numerical calculations by federal agencies (including the DoL), like "cost-of-living adjustments" and the rate of unemployment, are "rules" for APA and are void if such are not determined via the procedural requirements of the APA. In sharp contrast, the Fifth Circuit here has concluded precisely the opposite of that reached by the courts in *Alaniz* and *Batterton*.

REASONS FOR GRANTING THE WRIT

All U.S. courts of appeals, including the Fifth Circuit, have rendered decisions[3] analogous to that asserted here by Dr. Clayton: edicts and commands of federal agencies affecting the public at large by having the effect of law constitute "rules" for purposes of the APA, 5 U.S.C. §551, et seq., and are void if the procedures required thereby are not followed. Regarding this petition and the question raised here, the Federal and D.C. Circuits have concluded that agency actions identical to the determination of the CPI constitute "rules" for APA purposes. In contrast, the Fifth Circuit in this case has decided that the determination of the CPI by the DoL, while clearly affecting the public, is not a "rule" for APA purposes. Certiorari should be granted to resolve this split in the circuits regarding a very important matter of concern.

1. Significance and Importance of the CPI.

There exists, for at least two reasons, an institutional motivation to determine the CPI as lower than the actual rate of inflation. First, via a wide number of federal laws, expenditures for items such as welfare benefits, salaries for federal employees, payments to private contractors, etc., are increased when the rate of inflation increases. Under-reporting the actual rate of inflation results in the reduction of the rate of increase for federal expenditures, a substantial cost-saving benefit.

Second, under-reporting the CPI results in greater tax revenues received by the government. Tax

---

[3] See footnote 1.

receipts derived from the federal income tax are directly connected to the rate of inflation because tax rates are indexed to the CPI as set forth in 26 U.S.C. §1. As inflation pushes taxpayers into higher tax-brackets, tax revenues grow. If the tax-brackets do not rise as fast as the rate of inflation, real revenue growth occurs. Consequently for these two reasons, those DoL employees who actually calculate any CPI encounter a tremendous financial incentive to determine that rates of inflation are lower than they actually are.

These conclusions were reached by a 1996 federal Advisory Commission To Study The Consumer Price Index. This commission's report titled *Toward A More Accurate Measure Of The Cost Of Living,*[4] stated as follows:

> "The CBO has provided the Commission with updated projections of the impact of hypothetical corrections (reductions) of 0.5 and 1.0 percentage point in cost of living adjustments for fiscal years 1997-2006. With a reduction of 0.5 percentage point the total contribution to deficit reduction rises to $67.5 billion in 2006. Of this amount, an increase in revenue accounts for $22.3 billion and reductions in outlays, including debt service, amounts to $45.3 billion (of which debt service is $13.1 billion).
>
> "CBO projections for the impact of a hypothetical correction (reduction) in cost of

---

[4] Available on the Internet at: http://www.ssa.gov/history/reports/boskinrpt.html

> living adjustments of 1.0 percentage point are, of course, even more dramatic. The total change in the deficit in the year 2006 is $134.9 billion. Federal revenues would be increased by $44.5 billion and federal outlays reduced by $90.5 billion; of the reduction in outlays $26.1 billion can be attributed to lower debt service and $64.4 billion to lower outlays on indexed programs.
>
> "Stated differently, if the change in the CPI overstated the change in the cost of living by an average of one percentage point per year over this period, this bias alone would contribute almost $135 billion to the deficit in the year 2006. That is one-third the projected baseline deficit (which assumes no policy changes such as the current balanced budget proposals). More remarkably, the upward bias by itself would constitute the fourth largest federal outlay program, behind only social security, health care and defense. By 2008, the increased deficit would be $180 billion and national debt $1 trillion."

As shown by this report, understating or lowering any CPI results in a tremendous financial benefit for the federal government, including an actual increase in tax revenues. But, the CPI is not determined by Congress itself, which alone possesses the legislative power to tax, but instead by the DoL's Bureau of Labor Statistics, a federal agency lacking constitutional power to tax. Dr. Clayton asks via this petition a simple question: should not this number, upon which billions of dollars depend and which affects

millions of people, be determined with public participation according to the procedural requirements set forth in the APA?

Review of the relevant statute containing the APA definition of "rule" clearly demonstrates that the CPI really is a rule. A "rule" encompasses "the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing"; 5 U.S.C. § 551(4). The CPI prescribes for the "future" a "rate" commonly described as the "rate of inflation", and it is effective at least until a new CPI is determined and published. To the extent it is used to increase the wages and salaries of federal employees, it fits this definition precisely. Furthermore, the CPI is directly composed by "valuations" of "prices" and thus is not merely a "practice[ ] bearing on" these matters. But most certainly, the CPI fits the more common definition of a "rule" because it plainly implements the law. Here, it implements the law regarding the making of an income tax return.

Almost a quarter century ago, the Illinois Supreme Court was confronted with the question of whether a state agency's calculation of an "inflation-update factor" determined by the CPI was a rule for APA purposes. In *Senn Park Nursing Center v. Miller*, 104 Ill.2d 169, 178, 470 N.E.2d 1029 (1984), at issue were reimbursable costs owed to various nursing homes by a state agency, the amounts of such costs to be calculated via the CPI. That court held that there "is no doubt that the amended inflation-update procedure is an agency statement of general applicability. It does

implement a policy of the agency and is not a statement dealing only with the internal management of the agency. The rule does affect the rights and procedures available to people and entities outside the agency."

At the time of the decision in *Senn Park*, the D.C. Circuit had already decided *Batterton v. Marshall*, 648 F.2d 694 (D.C.Cir. 1980). In *Batterton*, that court reviewed a change in the DoL's method of measuring unemployment for the purpose of allocating CETA funds to the States. In noting that a change in this method would have a substantial impact on a State's right to receive CETA funds, that court held:

> "Advance notice and public participation are required for those actions that carry the force of law. These 'legislative' or 'substantive' rules can be issued only if Congress has delegated to the agency the power to promulgate binding regulations in the relevant area. Legislative rules thus implement congressional intent; they effectuate statutory purposes. In so doing, they grant rights, impose obligations, or produce other significant effects on private interests. They also narrowly constrict the discretion of agency officials by largely determining the issue addressed. Finally, legislative rules have substantive legal effect. They cannot be set aside by the courts unless found 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law'," *Id.*, at 701-02.
>
> "Therefore, the development of statistics no longer serves merely informational purposes,

> nor does it simply assist preliminary determinations prior to taking effective agency action. Instead, the chain of agency actions leading to allocation of funds under the emergency job program provides for agency discretion at only one link: the selection of statistical methodology for collecting and analyzing unemployment data. This certainly places DOL's selection of a statistical methodology within the APA's broad definition of rule as 'an agency statement . . . designed to implement . . . law,'" *Id.*, at 705.
>
> "The critical question is whether the agency action jeopardizes the rights and interest of parties, for if it does, it must be subject to public comment prior to taking effect," *Id.*, at 708.

A few years later in *Alaniz v. Office of Personnel Management*, 728 F.2d 1460, 1467 (Fed.Cir. 1984), that court was required to determine the validity of a reduction in the increase of "cost-of-living adjustments" for federal employees living in Alaska. The percentage annual increase in COLAs for these employees was found to be a "rule" for APA purposes, although void:

> "We have little difficulty in concluding that the district court correctly held that OPM's changes in the COLA methodology fit within the APA's definition of rulemaking. Section 551(5) (1982) defines rulemaking as 'agency process for formulating, amending, or repealing a rule.'
>
> ""These changes [modifications of the criteria in

> the COLA methodology based on more recent data, changes in consumer preference, and changes in sociological patterns] can be characterized as legislation on an administrative level. They were intended to have a future effect on federal employees receiving COLA compensation in the Anchorage area. In addition, the court has no problem perceiving the changes as amendments to a prescription for wage rates. Based on the foregoing, OPM's modifications of the COLA methodology constitute rulemaking'."

Alaniz and *Batterton* are directly relevant to the issue raised in this petition by Dr. Clayton. There is no substantive difference between COLAs (the subject of *Alaniz*) and annual changes in the CPI, which is a factor used to determine the minimum filing requirement amount ("exemption amount") for the filing of tax returns. To determine this minimum filing requirement amount, the DoL must compile each CPI, which is a statistical methodology no different (in a legal sense) from the one used for unemployment purposes by the same DoL in *Batterton*.

Alaniz and *Batterton* conform to the general principles of a wide variety and large number of cases concerning the APA. All of these cases hold that any agency edict, command or declaration designed to implement or enforce law enacted by Congress and which affects the public are rules, and must be properly adopted as required by the APA. Typical of these decisions is *Appalachian Power Co. v. E.P.A.*, 208 F.3d 1015, 1020-21 (D.C.Cir. 2000), which held:

"EPA tells us that its Periodic Monitoring Guidance is not subject to judicial review because it is not final, and it is not final because it is not 'binding.' * * * It is worth pausing a minute to consider what is meant by 'binding' in this context. Only 'legislative rules' have the force and effect of law. See *Chrysler Corp. v. Brown*, 441 U.S. 281, 302-03 & n. 31 (1979). A 'legislative rule' is one the agency has duly promulgated in compliance with the procedures laid down in the statute or in the Administrative Procedure Act. If this were all that 'binding' meant, EPA's Periodic Monitoring Guidance could not possibly qualify: it was not the product of notice and comment rulemaking in accordance with the Clean Air Act, 42 U.S.C. § 7607(d), and it has not been published in the Federal Register. But we have also recognized that an agency's other pronouncements can, as a practical matter, have a binding effect. See, e.g., *McLouth Steel Prods. Corp. v. Thomas*, 838 F.2d 1317, 1321 (D.C. Cir. 1988). If an agency acts as if a document issued at headquarters is controlling in the field, if it treats the document in the same manner as it treats a legislative rule, if it bases enforcement actions on the policies or interpretations formulated in the document, if it leads private parties or State permitting authorities to believe that it will declare permits invalid unless they comply with the terms of the document, then the agency's document is for all practical purposes 'binding.' See Robert A. Anthony, *Interpretative Rules, Policy Statements, Guidances, Manuals, and the*

Like — Should Federal Agencies Use Them to Bind the Public?, 41 Duke L.J. 1311, 1328-29 (1992), and cases there cited."

But the Fifth Circuit in this case involving Dr. Clayton has traversed the decisions not only in *Alaniz* and *Batterton*, but also decisional authorities in the same circuit[5] and many others. Its decision even conflicts with this Court's opinion in *Christensen v. Harris County*, 529 U.S. 576 (2000), by giving to a number calculated by the DoL and published only on the Internet and in a few financial newspapers and periodicals the force and effect of law.

It is entirely possible that the CPI is perhaps the most significant "underground" regulation ever to exist in American society. It affects hundreds of millions of people and determines the flow of billions of dollars annually. An agency edict this profound deserves to be publicly determined, contrary to the decision of the Fifth Circuit here.

CONCLUSION

The petition for writ of certiorari should be

---

[5] See *Phillips Petroleum Co. v. Johnson*, 22 F.3d 616, 621 (5th Cir. 1994)("This change in valuation technique dramatically affects the royalty values of all oil and gas leases. Thus, the Procedure Paper should have been published in the Federal Register and offered for notice and comment. A party may not be adversely affected by a rule promulgated in violation of these requirements. 5 U.S.C. § 552(a)(1)").

granted.

Respectfully submitted,

Lowell H. Becraft, Jr.
Counsel of Record for Petitioner
403 Andrew Jackson Way
Huntsville, Alabama 35801
(256) 533-2535

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 07-50002

UNITED STATES OF AMERICA, APPELLEE

v.

CHARLES THOMAS CLAYTON, APPELLANT.

Argued: September 5, 2007
Decided: October 29, 2007

Before KING, GARZA, and BENAVIDES, Circuit Judges.
Per Curiam:

Defendant-appellant Charles Thomas Clayton appeals from a jury verdict finding him guilty of two counts of making and subscribing a false amended tax return in violation of 26 U.S.C. § 7206(1) and six counts of willful failure to file a tax return in violation of 26 U.S.C. § 7203. Clayton appeals his conviction on the six counts of willful failure to file a tax return, arguing that the Internal Revenue Code and tax regulations do not contain a valid exemption amount, and as such there is no legal requirement to file a tax return. He also appeals his conviction on the two

counts of making and subscribing a false amended tax return, arguing that: (1) the district court erred in denying requested jury instructions pertaining to his defense and, (2) there is insufficient evidence to support his conviction. For the following reasons, we AFFIRM.

I. FACTUAL AND PROCEDURAL BACKGROUND

Defendant-appellant Charles Thomas Clayton is a radiologist who resides and practices in Texas. Clayton regularly filed federal income tax returns until he associated with a tax protest organization in 1992. He did not file a 1992 tax return or pay tax on his 1992 income. In October 1996, he pleaded guilty to willful failure to file a federal income tax return for 1992 and was sentenced to one year probation. He subsequently filed his 1997 and 1998 tax returns.

The events giving rise to the present conviction center on Clayton's tax returns for 1997 through 2004. In 2000, Clayton began associating with Larken Rose, a tax protestor. Together they launched a website and produced a video promoting the "§ 861 argument," which asserted that the domestic income of American citizens is not taxed via the Internal Revenue Code ("IRC"). Around this time, Clayton also began writing letters to the Internal Revenue Service ("IRS") and government officials, demanding that they refute the § 861 argument, and meeting with accountants to ask questions about the federal income tax code. Clayton received numerous replies explaining the fallacy of the § 861 argument, which Clayton patently refused to

accept.

Clayton did not file returns for calendar years 1999 through 2004, although he earned over $1.5 million during that period. He also filed amended tax returns for 1997 and 1998, via two "Form 1040X, Amended U.S. Individual Income Tax Return" forms, in which he reported his income as zero and requested a refund of $167,596 in previously-paid tax. Specifically, in April 2001, he filed a Form 1040X for 1997 reporting that his adjusted gross income was not $246,979, as he had original reported, but $0. He claimed a refund of $82,296. In April 2002, he filed a Form 1040X for 1998 reporting that his adjusted gross income was not $243,919, as he had original reported, but $0. He claimed a refund of $85,300. Clayton attached lengthy memoranda to each amended return based on the § 861 argument.

On April 4, 2006, Clayton was charged with two counts of making and subscribing a false Form 1040X Amended U.S. Individual Income Tax Return for calendar years 1997 and 1998 in violation of 26 U.S.C. § 7206(1). The indictment also charged him with six counts of willful failure to file a tax return for calendar years 1999 through 2004, in violation of 26 U.S.C. § 7203. With respect to the six counts of willful failure to file a tax return, Clayton filed a motion to dismiss the indictment, arguing that the government could not satisfy the first element of the offense, namely that he was required by law to file income tax returns for these years, because the IRC does not establish a valid exemption amount that triggers the duty to pay taxes. The district court denied this motion. Clayton also

submitted two jury instructions concerning his theory of defense to the two counts of filing a false tax return. The district court rejected his instructions. The jury found Clayton guilty of all eight counts on August 29, 2006. On September 5, 2006, Clayton filed a Rule 29 motion for a judgment of acquittal on the two counts of filing a false tax return, which the district court denied. Clayton was sentenced to a total of sixty months incarceration. Subsequently, we denied Clayton's motion for release on bail pending appeal, concluding that Clayton had not shown that his appeal raises a substantial question of law or fact.

II. DISCUSSION

A. Whether Inclusion of the Consumer Price Index Negates the Duty to File a Tax Return

Clayton argues that the district court erred in denying his motion to dismiss the six counts of willful failure to file a federal tax return because the court erroneously determined that the government satisfied the first element of a 26 U.S.C. § 7203 violation—that Clayton was required to file a federal tax return. *See United States v. Buckley*, 586 F.2d 498, 503-04 (5th Cir. 1978) (providing that in order to establish a violation of 26 U.S.C. § 7203, the government must prove (1) that the defendant was required to file a return; (2) that the defendant failed to file a return; and (3) that the failure to file a return was willful); *see also United States v. Matosky*, 421 F.2d 410, 413 (7th Cir. 1970) (same); *Sansone v. United States*, 380 U.S. 343, 351 (1965).

Clayton contends that no "law" requires the filing of a federal income tax return because, in establishing the exemption amount in 26 U.S.C. § 6012,[1] the government failed to comply with the procedural requirements of the Administrative Procedure Act ("APA"). 5 U.S.C. §§ 551-558. Clayton contends that the statute's reliance on the Consumer Price Index ("CPI") to calculate the exemption amount[2]

---

[1] Title 26 U.S.C. § 6012 provides: "Returns with respect to income taxes under subtitle A shall be made by . . . [e]very individual having for the taxable year gross income which equals or exceeds the *exemption amount*." 26 U.S.C. § 6012(a) (emphasis added).

[2] The term "exemption amount" as used in § 6012 is defined by 26 U.S.C. § 151(d)(1): "Except as otherwise provided in this subsection, the term 'exemption amount' means $2,000." 26 U.S.C. § 151(d)(1). Section 151(d)(4) in turn provides for inflation adjustments to the $2,000 figure listed in § 151(d):

> after 1989, the dollar amount contained in paragraph (1) shall be increased by an amount equal to—
> (I) such dollar amount, multiplied by
> (ii) the cost-of-living adjustment determined under [26 U.S.C.] section 1(f)(3) for the calendar year in which the taxable year begins, by substituting "calendar year 1998" for "calendar year 1992" in subparagraph (B) thereof.

strips the exemption amount of legal force because the CPI is compiled by the Department of Labor ("DOL") and has not been promulgated pursuant to the APA.[3]

---

26 U.S.C. § 151(d)(4). Title 26 U.S.C. § 1(f)(3) provides that "the cost-of-living adjustment for any calendar year is the percentage (if any) by which—(A) the CPI [(Consumer Price Index)] for the preceding calendar year, exceeds (B) the CPI for the calendar year 1992." 26 U.S.C. § 1(f)(3). Finally, 26 U.S.C. § 1(f)5 provides that "the term 'Consumer Price Index' means the last Consumer Price Index for all-urban consumers published by the Department of Labor." 26 U.S.C. § 1(f)(5).

[3]Clayton also argues that to the extent that the exemption amount is listed in the Form 1040 instruction booklet, under the APA, 5 U.S.C. §§ 551-558, this instruction booklet cannot impose a legal duty on individuals because those exemption amounts are not published in the Federal Register. *See United States v. Harvey*, 659 F.2d 62, 64 (5th Cir. 1981) (holding that the Veterans Administration's loan servicing manual had no force and effect of law because it was not "promulgated in accordance with the procedural requirements of the [APA]"). Clayton asserts that at best, the Form 1040 instruction booklet can be considered as an interpretive regulation not subject to the procedures of the APA, but that an interpretive regulation cannot form the basis for a civil or criminal action against Clayton. *See Drake v. Honeywell, Inc.*, 797 F.2d 603, 607 (8th Cir. 1986) ("An

We review questions of statutory interpretation *de novo*. *United States v. Adam*, 296 F.3d 327, 330 (5th Cir. 2002).

Clayton's argument that an exemption amount based on the CPI cannot trigger tax liability is unpersuasive. Clayton's obligation to file a federal income tax return is derived from 26 U.S.C. § 6012. Section 6012, being a congressionally enacted federal statute, is not the rule of an "agency" as the term agency is defined by the APA. *See Franklin v. Massachusetts*, 505 U.S. 788, 800 (1992) (explaining that "[t]he APA defines 'agency' as 'each authority of the Government of the United States, whether or not it is within or subject to review by another agency," but explicitly does not include the Congress) (citing 5 U.S.C. §§ 701(b)(1), 551 (1)). The fact that § 6012 incorporates by reference the CPI, which is compiled and published by an agency of the DOL, does not cause

---

action based on a violation of an interpretive rule does not state a legal claim. Being in nature hortatory, rather than mandatory, interpretive rules can never be violated.").

Clayton's Form 1040 instruction booklet argument is a red herring. Although the IRS indeed publishes the annual exemption amounts in the Form 1040 instruction booklet and other government publications, the government makes no claim that the exemption amount listed in the Form 1040 instruction booklet has the force of law. Instead, the exemption amount is calculated under a formula that is set forth in § 6012 of the IRC.

the APA to be invoked. In this context, the CPI is simply an ascertainable numerical standard, and there is no requirement that such a standard incorporated into a statute be itself an enforceable rule of law. *Cf. Ashcroft v. ACLU*, 535 U.S. 564, 585 (2002) (holding that the incorporation of "community standards," by itself, did not make the Child Online Protection Act unconstitutionally overbroad).

Furthermore, a statute providing the basis for criminal prosecution may incorporate other provisions by reference. *See United States v. Iverson*, 162 F.3d 1015, 1021 (9th Cir. 1998). In *United States v. Iverson*, the Ninth Circuit held that a state statute and municipal code that incorporated by reference federal standards for the term "pollutants" did not fail for unconstitutional vagueness. *Id.* The court reasoned that "a statute is not unconstitutionally vague merely because it incorporates other provisions by reference; a reasonable person of ordinary intelligence would consult the incorporated provisions." *Id.*

The Ninth Circuit's rationale is persuasive here. The CPI is an objective standard that has been approved by Congress, via the IRC, to adjust the bare minimum exemption amount of $2,000 for inflation. A reasonable person of ordinary intelligence, if he did not want to avail himself of the IRS documents and notices publishing the applicable exemption amounts, would consult the CPI and make the necessary calculations to determine his gross income for tax purposes. *See Pond v. Comm'r*, 211 Fed. Appx. 749, 752 (10th Cir. 2007) (unpublished) (explaining that the IRC's provision of a specific number, $2000, and a statutory formula for

adjusting that number, adequately defines the exemption amount and permits a taxpayer to be penalized for noncompliance); *see also United States v. Priest*, Nos. 06-10438, 06-10447, 06-10448, 2007 WL 1961885, at *2 (9th Cir. July 5, 2007) (unpublished mem.) (holding that "the alleged imprecision [caused by incorporating the CPI] in determining a statutorily provided exemption does not void, as a matter of law, the obligation to file a tax return").

B. Whether the Denial of the Defense's Jury Instructions Was an Abuse of Discretion

Clayton argues that the district court abused its discretion in denying the jury instructions he requested on his theory of defense to the two counts of filing a false income tax return.

We review a properly preserved challenge to jury instructions for an abuse of discretion. *United States v. Finley*, 477 F.3d 250, 261 (5th Cir. 2007). "A district court has broad discretion in framing the instructions to the jury and this [c]ourt will not reverse unless the instructions taken as a whole do not correctly reflect the issues and law." *United States v. McKinney*, 53 F.3d 664, 676 (5th Cir. 1995). "While a defendant is entitled to an instruction on his theory of defense, he has no right to particular wording." *United States v. Simmons*, 374 F.3d 313, 319 (5th Cir. 2004). "When considering an appeal for failure to give defendant's requested defense theory instruction, we review 'whether the court's charge, as a whole, is a correct statement of the law and whether it *clearly* instructs jurors as to the principles of law applicable to the

factual issues confronting them.'" *Id.* (quoting *McKinney*, 53 F.3d at 676) (emphasis added).

A person commits the felony of filing a false tax return in violation of 26 U.S.C. § 7206(1) when he "[w]illfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter." § 7206(1).

Clayton requested two jury instructions concerning his theory of defense to the counts of filing a false income tax return for 1997 and 1998. Clayton's theory of defense at trial was that the two Form 1040Xs that he submitted to amend his tax returns for 1997 and 1998 were not false returns, but rather were proper and lawful claims for refunds. Clayton asserted that he filed Form 1040X returns to initiate a process whereby, if his claims for a refund were denied, he could present in a later district court proceeding his § 861 argument that income derived from sources within the United States is non-taxable income. Accordingly, he attached to his two Form 1040X returns lengthy memoranda explaining his § 861 argument. Clayton contends that whether the returns were false or were claims for refunds was a central focus of the trial, and, based on the evidence, the jury could have concluded these issues in favor of Clayton.

The jury instructions Clayton requested detail the Form 1040X filing procedure and are as follows:

> REFUND LAWSUITS
>
> If a taxpayer has filed a return and paid taxes for a prior year, he may seek a refund of taxes paid for that year. This is accomplished by filing a Form 1040X within 3 years thereof. If such a claim is denied, a taxpayer may sue to recover the refund and may assert in such refund lawsuit whatever legal arguments he believes are valid.
>
> REFUND SUITS
>
> A taxpayer is barred from raising in a refund suit grounds for recovery not clearly and specifically set forth in his claim for a refund on Form 1040X, including all attachments. All grounds upon which the taxpayer relies must be stated in his claim for refund so as to apprise the IRS of what to look into. Anything not raised in the claim cannot be raised later in a suit for a refund. The refund suit must be filed in either federal District Court or a Claims Court, but cannot in [sic] Tax Court.

Clayton's argument lacks merit because his proposed jury instructions are misleading. Clayton asserts that a Form 1040X cannot give rise to liability for filing a false tax return because it is simply a form used to claim a refund. *See* 26 C.F.R. 301.6402-3(a)(2). His instructions would serve to bolster that argument. Form 1040X is entitled "Amended U.S. Individual Income Tax Return" and is verified by a written

declaration that it was made under penalties of perjury. Because Form 1040X is used to report all changes or corrections to a filed return, even when the form is used to claim a refund, it is still a return that amends an originally filed return. As such, Form 1040X can give rise to liability for filing a false tax return.

Our decisions, and those of other circuits, support the conclusion that filing a false claim for the refund of taxes gives rise to legal liability for filing a false tax return. *See, e.g.*, *United States v. Martin*, 790 F.2d 1215 (5th Cir. 1986) (defendant convicted of conspiracy to aid and assist in the preparation of false tax returns and false tax refund claims in violation of 26 U.S.C. § 7206(2) and 18 U.S.C. §§ 371, 287); *United States v. Ambort*, 405 F.3d 1109 (10th Cir. 2005) (defendant convicted of sixty-nine counts of aiding and assisting in the preparation of false federal tax returns, in violation of 26 U.S.C. § 7206(2), for advising individuals on how to complete Form 1040X and the nonresident alien income tax return form). Moreover, use of a legal procedure to challenge tax liability does not preclude criminal liability. In *Ambort*, where a defendant advised clients to file Form 1040X to avoid tax liability, he attempted to avoid conviction on charges of aiding and assisting in the preparation of false federal tax returns by arguing that he was simply following established procedures for obtaining a refund. *Id.* at 1116. The Tenth Circuit rejected his argument, stating that the defendant could not "disguise his knowing disregard of well-established legal principles and duties as a good faith procedural effort to evade those principles and duties." *Id.*

We have already rejected, in an unpublished opinion, as "patently frivolous" and "absurd" the argument that income derived from sources within the United States is non-taxable income under § 861. *Rayner v. Comm'r*, 70 F. App'x 739, 740 (5th Cir. 2003) (unpublished). As such, Clayton should not avoid liability for filing a false tax return simply because he used the procedural device of Form 1040X to challenge his tax liability under the § 861 argument.

Accordingly, because Clayton's proposed instructions would not clearly instruct jurors about the effect of filing a false Form 1040X, the district court did not abuse its discretion in denying them.[4]

C. Whether sufficient evidence was presented to find guilt beyond a reasonable doubt

Clayton argues that the district court erred in denying his post-trial motion for judgment of acquittal on the two counts of filing a false income tax return for 1997 and 1998 because the evidence was insufficient to support his conviction. Clayton first asserts that it is clear from the facts that he was making a "claim for refund" of taxes previously paid and thus could not be

---

[4]Since Clayton's appellate challenge to the jury instructions does not relate to the element of wilfulness under § 7206(1), we find it unnecessary to determine whether his proffered jury instructions, which were intended to explain and support his "theory of defense," would have created confusion as to the willfulness element.

charged for filing false returns. He relies on our decision in *United States v. Levy*, 533 F.2d 975 (5th Cir. 1976), for the proposition that liability cannot arise from a form that is not authorized by a regulation. He contends that the Form 1040X cannot give rise to liability because it is identified as a claim for refund in certain tax code provisions. He further contends that Form 1040X allows him to file an amended tax return based on any legal argument.

Clayton next argues that the evidence that his amended returns were false falls short of proving his guilt beyond a reasonable doubt. He contends that the attachments that he filed with his amended returns advancing his § 861 argument make clear that his purpose in filing the amended returns was to claim a refund, not to file a false return. He further asserts that where the evidence is evenly balanced, entry of a judgment of acquittal is proper.

We review the district court's denial of Clayton's motion for acquittal *de novo*. *United States v. Anderson*, 174 F.3d 515, 522 (5th Cir. 1999) (citing *United States v. Payne*, 99 F.3d 1273, 1278 (5th Cir. 1996)). In reviewing the sufficiency of the evidence, we view the evidence and the inferences drawn therefrom in the light most favorable to the verdict, and we determine whether a rational jury could have found the defendant guilty beyond a reasonable doubt. *Id.* (citing *United States v. Burton*, 126 F.3d 666, 669 (5th Cir. 1997); *Payne*, 99 F.3d at 1278). "The evidence need not exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilt, and the jury is free to choose among

reasonable constructions of the evidence." *Id.* (quoting *Burton*, 126 F.3d at 669–70). "Moreover, our standard of review does not change if the evidence that sustains the conviction is circumstantial rather than direct." *Id.* (citing *Burton*, 126 F.3d at 670; *United States v. Cardenas*, 9 F.3d 1139, 1156 (5th Cir. 1993); *United States v. Bell*, 678 F.2d 547, 549 n.3 (5th Cir. Unit B 1982)).

A person commits the felony of filing a false tax return in violation of 26 U.S.C. § 7206(1) when he "willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter." § 7206(1).

Clayton's initial arguments, which essentially contend that the Form 1040X cannot give rise to legal liability for filing a false tax return, have no merit. We have rejected similar arguments brought under *Levy* that certain schedules appended to tax returns could not give rise to legal liability for filing a false tax return. *United States v. Damon*, 676 F.2d 1060, 1063–64 (5th Cir. 1982) (holding that a false Schedule C is an "integral" part of a tax return and is incorporated therein by reference, thus giving rise to liability under § 7206(1)); *United States v. Taylor*, 574 F.2d 232, 237 (5th Cir. 1978) (same as to Schedules E and F). Also, as we previously discussed, filing a false claim for the refund of taxes may give rise to legal liability for filing a false tax return, and the mere use of the correct legal procedure will not preclude liability. *See Ambort*, 405 F.3d at 1116 (stating that the

defendant "cannot disguise his knowing disregard of well-established legal principles and duties as a good faith procedural effort to evade those principles and duties").

Furthermore, after reviewing the evidence in the light most favorable to the verdict, we conclude that a jury reasonably could have found Clayton guilty on Counts 1 and 2 in the indictment. The government's theory of the case was that Clayton had been constructing a putative defense centered around his sham § 861 argument as early as June 2000, before ever having filed a false Form 1040X. The evidence presented, and reasonable inferences therefrom, revealed that Clayton knew that his § 861 argument was invalid under the law, and therefore, that his amended returns based on that argument, were false. The government's evidence included Clayton's 1997 and 1998 original returns, stating his income as $246,979 and $243,919, respectively, juxtaposed with Clayton's Form 1040X returns, purporting that his adjusted gross income for 1997 and 1998 was, in fact, zero.

Additionally, the evidence showed that before Clayton filed his first Form 1040X in April 2001, seeking a refund from 1997, he received at least three responses to letters he sent demanding answers to his § 861 argument, which all invalidated the theory. Clayton received a letter from the United States Department of Treasury on December 21, 2000, stating that a U.S. citizen is subject to tax on his or her worldwide income, and that the source rules of §§ 861–865 of the IRC do not limit or exclude items

from consideration for purposes of determining a U.S. citizen's taxable income. Clayton also received correspondence from David Johnston, a New York Times reporter, who told him the § 861 argument was a fantasy, pure and simple. When, Clayton challenged this conclusion based on the fact that Johnston was not a lawyer, Clayton received yet another response from Johnston stating that he asked lawyers, including tax lawyers, and everyone agreed that taxes are owed. Also, testimony from Clayton's CPA David Smith revealed that he advised Clayton that the theory was invalid. However, Clayton dismissed these replies and advice and submitted Form 1040X based on his § 861 argument anyway.

The evidence also showed that before sending his second Form 1040X in April of 2002 to request a refund for the original 1998 tax return, Clayton received at least three more responses to his letters, similarly putting him on notice that his § 861 argument was flawed. In May of 2001, he received two emails from Tax Help stating that the obligation to pay taxes is not optional, the average citizen knows taxes are required, and income includes all income worldwide. In July 2001, the IRS sent him another letter with an attached Notice 2001-40 stating that those who continue to follow the § 861 argument in refusing to file returns may well be subject to criminal penalties. Again, Clayton testified that he disregarded these letters as not addressing the issue he presented.

Additionally, by Clayton's own written words, it was reasonable for a jury to conclude, beyond a reasonable doubt, that he willfully filed what he

subjectively knew were false amended returns. The evidence revealed that in June 2000, around the time Clayton initiated his research regarding the § 861 argument, he sent an email to a fellow tax protester, Larken Rose, stating that "by God (or whatever) I am going to screw [the IRS] for screwing me." In the same month, Clayton sent Rose another email discussing how to deceive the online public into thinking more than just a few people were advocating the § 861 argument. He ended that email with the line: "Sometimes (most of the time) I am so full of shit it amazes me." In yet another email exchange with Rose, Clayton seemed to be constructing a defense to future litigation when he discussed documenting the "solid stuff" about the § 861 argument, and then stated, "if they were ever stupid enough to bring it to court, that knowing what I do about what can be dealt with in criminal court (which is ANYTHING convinced me of my position) that all this stuff would be brought out formally and kill them dead." Then, in March of 2001, Clayton mentioned taking "proactive steps" to protect himself from indictment in another email to Rose.

On this evidence, a rational jury could have found beyond a reasonable doubt that Clayton knew his Form 1040X returns were false under the tax laws and wilfully filed them in violation of 26 U.S.C. § 7206(1) to obtain refunds for 1997 and 1998.

III. CONCLUSION

For the foregoing reasons, we AFFIRM the district court's judgment.

EMILIO M. GARZA, Circuit Judge, specially concurring:

I concur in the panel's excellent opinion. I write separately to suggest that the panel's holding reached in Part II.B, dealing with Clayton's requested jury instructions, can be supported by a separate rationale, and to distinguish the probative weight to be given some of the evidence mentioned in Part II.C, where the panel opinion discusses the sufficiency of evidence to establish Clayton's guilt.

Clayton's proposed instructions need not have been included by the district court because of their likelihood to mislead jurors. First and foremost, these instructions do not give the jury any guidance as to what the government must prove, or what Clayton may legitimately raise in defense, specifically generating confusion as to the willfulness element under § 7206(1). The proposed instructions suggest that his use of a Form 1040X impacts the willfulness of his action, and thus his criminal liability under § 7206(1). By providing information about an irrelevant refund lawsuit process that allows a taxpayer to pursue "whatever legal arguments he believes are valid," these instructions draw attention away from the willfulness *vel non* of Clayton's use of the Form 1040X. Clayton acted wilfully in his false filing regardless of the form used. Further, Clayton cannot undermine willfulness in a § 7206 prosecution based on any argument he chooses. *See Cheek v. United States*, 498 U.S. 192, 206 (1991); *United States v. Ambort*, 405 F.3d 1109, 1115-16 (10th Cir. 2005) (excluding defendants' testimony that they believed they were following proper

procedures to challenge the existing law as irrelevant to willfulness under § 7206). Merely invoking the unrelated process of a refund lawsuit does not change this fact. In fashioning jury instructions, the district court should clearly instruct jurors as to the applicable issues of law and fact confronting them. *See United States v. Simmons*, 374 F.3d 313, 319 (5th Cir. 2004). Clayton's instructions would have misguided jurors as to the willfulness element of his crime. For this reason, I agree that the district court did not abuse its discretion in denying Clayton's proposed instructions.

Concerning the evidence supporting Clayton's guilt discussed in Part II.C, I agree that each item of evidence included in the panel opinion provides some proof of Clayton's willfulness. FED. R. EVID. 401. However, it should be noted that Clayton's own statements are much more probative of his willfulness than information given to him by a newspaper reporter. While the latter provides some evidence, standing alone it could not establish Clayton's willfulness.

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Case No. A06-CR-069 SS

UNITED STATES OF AMERICA,

v.

CHARLES THOMAS CLAYTON,

Defendant.

ORDER

BE IT REMEMBERED on the 28th day of July 2006, the Court called the above-styled cause for a hearing, and the parties appeared through counsel. Before the Court were Defendant's Motion to Dismiss Counts 3 Through 8 for Lack of Filing Requirement [#16], Defendant's Motion to Dismiss Counts 3 Through 8 for Failure to Comply with the Paperwork Reduction Act [#17], Defendant's Motions in Limine [#18, 19], Defendant's Motion to Compel Disclosure of the Government's Trial Exhibits [#20], Defendant's Motion to Compel Discovery of Personnel Files [#21], Defendant's Motion to Inspect Jury Records [#22], Defendant's Motion for Disclosure of Information Regarding the Jury Panel and Jury Contact [#23], Defendant's Motion for Disclosure of the IRS Special Agent's Report [#24], the Government's Response [#25], and Defendant's Reply [#28]. Having considered the motions, the Government's response, Defendant's

reply, and the arguments presented at the hearing, the Court now confirms its oral announcements with the following written opinion and orders.

Background

Defendant Charles Thomas Clayton, a radiologist, was indicted by the grand jury in April 2006 for violations of 26 U.S.C. § 7206(1)–willful subscription to false income tax returns– nd § 7203–willful failure to file federal income tax returns. The indictment alleges that Clayton did not file federal income tax returns for calendar years 1999 through 2004 although he received gross income totaling approximately $1.5 million during that time period.

Discussion

I. Defendant's Motion to Dismiss Counts 3–8 for Lack of Filing Requirement [#16] Defendant moves to dismiss Counts 3 through 8 of the indictment, for failure to file income tax returns, because the statutes and regulations do not provide notice of the threshold filing requirement. Defendant asserts his Fifth Amendment right of due process, claiming a lack of notice that his failure to file tax returns was illegal and/or that 26 U.S.C. § 6012 is ambiguous as to the exemption amount that triggers the filing requirement. Defendant argues that the exemption amount does not appear in the code or the federal regulations; therefore, its appearance in other IRS publications is not "law" with which American citizens are required to comply.

The Court agrees with the Government that

Defendant could easily have determined the exemption amount triggering the filing requirement in every year at issue by: (1) simply reading the Form 1040 and/or the accompanying instructions for the pertinent tax year, both of which state the exemption amount, or (2) going through the process of cross referencing the statutes, regulations, and the consumer price index to calculate the figure referenced in option one. The statutory requirement to file income tax returns is located in 26 U.S.C. §§ 6001, 6011, and 6012, while § 7203 makes the willful failure to file income tax returns a criminal offense. *See United States v. Bowers*, 920 F.2d 220, 221–23 (4th Cir. 1990) (upholding convictions in a tax evasion case because the federal regulations set forth sufficient advice on how to obtain the forms or information necessary to prepare a tax return). Here, if Defendant had taken the time to follow the cross references within the statutes and regulations, he would have been able to determine the amount of gross income that triggers the duty to file a tax return. Accordingly, Defendant's motion to dismiss is denied.

II. Defendant's Motion to Dismiss Counts 3–8 for Failure to Comply with the Paperwork Reduction Act [#17]

Next Defendant moves to dismiss Counts 3–8 for failure to comply with the Paperwork Reduction Act ("PRA") because the forms for the subject years do not contain correct OMB numbers, or otherwise have PRA defects, so the Government has failed to comply with the PRA, 44 U.S.C. § 3512. Defendant essentially argues that the 1995 amendment to 44 U.S.C. § 3512

so changed the Act that pre-1995 case law holding that a PRA violation does not bar a criminal prosecution for failure to file a tax return is no longer controlling. *See United States v. Kerwin*, 945 F.2d 92, 92 (5th Cir. 1991) (upholding conviction for willful failure to file an income tax return under § 7203 because the PRA does not apply to the statutory requirement that a taxpayer file an income tax return); *United States v. Hicks*, 947 F.2d 1356, 1359–60 (9th Cir. 1991) (holding that Congress did not intend to repeal § 7203 by enacting the PRA).

Defendant's argument is unavailing because those courts that have examined the issue post-1995 have decided that the PRA does not invalidate the statutory requirement to file tax returns. *United States v. Ouwenga*, 173 F. App'x 411, 417 (6th Cir. 2006); *Alford v. United States*, No. 3:02-CV-1719-M, 2002 WL 31415800 (N.D. Tex. Oct. 22, 2002); *United States v. Foster*, No. CRIM.97-700103JMRRLE, 1997 WL 685371 (D. Minn. May 27, 1997). Additionally, the regulations implementing the PRA of 1995 explicitly provide that the PRA does not "preclude the imposition of a penalty on a person for failing to comply with a collection of information that is imposed on the person by statute–e.g., 26 U.S.C. § 6011(a) (statutory requirement for a person to file a tax return)"). 5 C.F.R. § 1320.6(e). Accordingly, Defendants motion is denied.

III. Defendant's Motions in Limine [#18, 19]

Defendant's first motion in limine [#18] requests that the Government be prohibited from "appealing to

the jury's prejudice, emotion, or pecuniary interest during trial," and Defendant's second motion in limine [#19] seeks to prevent the Government from offering into evidence Defendant's prior conviction for failure to file a tax return and Defendant's bankruptcy.[1] For the reasons stated at the hearing, both motions in limine are denied. This denial is not an order of admissibility; rather, admissibility determinations will be made after proper objection at the proper time during trial.

IV. Defendant's Motion to Compel Disclosure of the Government's Trial Exhibits [#20]

Defendant moves for an order directing the Government to disclose the exhibits it plans to use at trial, and the Government opposes the motion. The Court notes that the Government has an open file discovery policy. For the reasons set forth during the hearing, the motion is granted, and the Government shall provide Defendant with inclusive lists of both exhibits and witnesses it plans to use at trial by August 14, 2006. Likewise, Defendant shall produce to the Government by August 17, 2006, its trial exhibit and witness lists.

V. Defendant's Motion to Compel Discovery of Personnel Files [#21]

Defendant moves for an order directing

---

[1] As for the bankruptcy evidence, Defendant has objected to an order signed and agreed to by Defendant.

disclosure to Defendant of the personnel files of government witnesses, or, in the alternative, for *in camera* review of those files with a determination of whether the files should be disclosed to the Defendant. *United States v. Henthorn*, 931 F.2d 29 (9th Cir. 1991), provides that the Government must "'disclose information favorable to the defense that meets the appropriate standard of materiality . . . . If the prosecution is uncertain about the materiality of information within its possession, it may submit the information to the trial court for an in camera inspection and evaluation . . . .'" *Id.* at 30–31 (quoting *United States v. Cadet*, 727 F.2d 1453, 1467–68 (9th Cir. 1984). "[T]he government has a duty to examine personnel files upon a defendant's request for their production." *Henthorn*, 931 F.2d at 31. "However, following that examination, the files need not be furnished to the defendant or the court unless they contain information that is or may be material to the defendant's case." *Id.* In accordance with the *Henthorn* case, the Court orders the Government to provide any personnel files of testifying witnesses that contain information that is or may be material to the defendant's case to the Court under seal for in camera inspection by August 14, 2006.

VI. Defendant's Motion to Inspect Jury Records [#22] and Defendant's Motion for Disclosure of Information Regarding the Jury Panel and Jury Contact [#23]

For the reasons stated at the hearing, both motions are denied. Defendant shall have access to information about the jury panel on the morning of jury selection, as the jurors do not prepare

questionnaires until that time. The Government stated on record that it did not possess information about the jury panel at this time. If the Government does come to possess such information between the time of the hearing and the beginning of trial, it shall disclose such information to Defendant.

As it stands, the Government, the Defendant, and the Court will get the same information about the jury panel at the same time, which is the morning of jury selection.

VII. Defendant's Motion for Disclosure of the IRS Special Agent's Report [#24]

As stated at the hearing, Defendant's motion is granted. The Government shall provide Defendant with a certification from the IRS Special Agent that Defendant has been provided with a complete copy of his report recommending prosecution.

Conclusion

In accordance with the foregoing:

IT IS ORDERED that Defendant's Motion to Dismiss Counts 3–8 for Lack of Filing Requirement [#16] and Defendant's Motion to Dismiss Counts 3–8 for Failure to Comply with the Paperwork Reduction Act [#17] are DENIED;

IT IS FURTHER ORDERED that Defendant's Motions in Limine [#18, 19] are DENIED;

IT IS FURTHER ORDERED that Defendant's Motion to Compel Disclosure of the Government's Trial

Exhibits [#20] is GRANTED and the Government shall provide Defendant with inclusive lists of both exhibits and witnesses it plans to use at trial by August 14, 2006. Likewise, Defendant shall produce to the Government by August 17, 2006, its trial exhibit and witness lists;

IT IS FURTHER ORDERED that Defendant's Motion to Compel Discovery of Personnel Files [#21] is GRANTED as set forth above;

IT IS FURTHER ORDERED that Defendant's Motion to Inspect Jury Records [#22] and Defendant's Motion for Disclosure of Information Regarding the Jury Panel and Jury Contact [#23] are DENIED; and

IT IS FINALLY ORDERED that Defendant's Motion for Disclosure of the IRS Special Agent's Report [#24] is GRANTED.

SIGNED this the 2nd day of August 2006.

SAM SPARKS
UNITED STATES
DISTRICT JUDGE

FILED
MAR 7 - 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 07-904

In the Supreme Court of the United States

CHARLES THOMAS CLAYTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
NATHAN J. HOCHMAN
Assistant Attorney General
ALAN HECHTKOPF
KAREN QUESNEL
S. ROBERT LYONS
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether an individual's legal duty to file a tax return if his gross income exceeds a minimum threshold is negated because the threshold is calculated by reference to the Consumer Price Index.

TABLE OF CONTENTS

Page

Opinion below 1
Jurisdiction 1
Statement 1
Argument 3
Conclusion 6

TABLE OF AUTHORITIES

Cases:

Alaniz v. *OPM*, 726 F.2d 1460 (Fed. Cir. 1984) 4
Batterton v. *Marshall*, 648 F.2d 694 (D.C. Cir. 1980) 4
Christensen v. *Harris County*, 529 U.S. 576 (2000) 5
Phillips Petroleum Co. v. *Johnson*, 22 F.3d 616 (5th Cir.), modified on reh'g, 36 F.3d 89 (5th Cir. 1994), cert. denied, 514 U.S. 1092 (1995) 5
United States v. *Booker*, 543 U.S. 220 (2005) 4
Wisniewski v. *United States*, 353 U.S. 901 (1957) 5

Statutes:

Administrative Procedure Act, 5 U.S.C. 551 *et seq.* 3
5 U.S.C. 551(4) 5
Internal Revenue Code (26 U.S.C.):
§ 1(f)(3)-(5) 2
§ 151(d) (2000 & Supp. V 2005) 2
§ 151(d)(4)(A) 2
§ 6012 (2000 & Supp. V 2005) 2, 3, 4
§ 6012(a)(1)(A) 2

Statutes—Continued: Page

§ 7203 ..... 1, 2
§ 7206(1) 1, 2

In the Supreme Court of the United States

No. 07-904

CHARLES THOMAS CLAYTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 506 F.3d 405.

JURISDICTION

The judgment of the court of appeals was entered on October 29, 2007. The petition for a writ of certiorari was filed on January 4, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Texas, petitioner was convicted on two counts of making and subscribing a false tax return, in violation of 26 U.S.C. 7206(1), and six counts of willful failure to file a tax return, in violation of 26 U.S.C. 7203. He was sentenced to 60 months of

imprisonment. The court of appeals affirmed. Pet. App. 1a-20a.

1. Section 6012 of the Internal Revenue Code requires individuals to file a tax return if their gross income exceeds certain thresholds, which are defined by reference to the "exemption amount." 26 U.S.C. 6012(a)(1)(A). By statute, the exemption amount is set at $2000 but is subject to annual adjustments for inflation. 26 U.S.C. 151(d) (2000 & Supp. V 2005). Specifically, in each taxable year, the exemption amount is to be increased by the "cost-of-living adjustment," which is calculated based on "the last Consumer Price Index for all-urban consumers published by the Department of Labor." 26 U.S.C. 1(f)(3)-(5), 151(d)(4)(A).

2. In 1992, petitioner, a medical doctor, became associated with a tax-protest organization. Pet. App. 2a. He did not file a 1992 tax return or pay any tax on his income that year. *Ibid.* He later pleaded guilty to willful failure to file an income-tax return for 1992, and he was sentenced to one year of probation. *Ibid.*

Petitioner filed returns for 1997 and 1998, but by 2000, he began promoting the so-called "Section 861 argument," which asserts that only foreign-source income is subject to the United States income tax, while income from domestic sources is exempt. Pet. App. 2a. Petitioner refused to file returns for the years 1999 through 2004, even though he earned over $1.5 million during that period. *Id.* at 3a. In addition, he filed amended returns for 1997 and 1998 in which he falsely reported his income as zero and sought the refund of over $167,000 in previously paid tax. *Ibid.*

3. Petitioner was charged with two counts of making and subscribing a false amended tax return for calendar years 1997 and 1998, in violation of 26 U.S.C. 7206(1),

and six counts of willful failure to file a tax return, for calendar years 1999-2004, in violation of 26 U.S.C. 7203. Pet. App. 3a. The jury found petitioner guilty on all eight counts, and petitioner was sentenced to 60 months of imprisonment. *Id.* at 4a.

4. The court of appeals affirmed. Pet. App. 1a-20a. Petitioner argued that no law requires the filing of a federal income-tax return, because the government did not follow the rulemaking procedures of the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, in promulgating the Consumer Price Index (CPI), which is used to establish the exemption amount. Pet. App. 5a. The court of appeals rejected that argument. It explained that the obligation to file a federal income-tax return is derived from 26 U.S.C. 6012 (2000 & Supp. V 2005), which, being a statute enacted by Congress, is not a rule of an "agency" as that term is defined by the APA. Pet. App. 7a. The court noted that the CPI "is simply an ascertainable numerical standard" incorporated by reference into the statute, "and there is no requirement that such a standard incorporated into a statute be itself an enforceable rule of law." *Id.* at 8a.

ARGUMENT

Petitioner claims that he was not legally obligated to file tax returns because the Internal Revenue Code refers to the CPI, which is not promulgated through APA rulemaking procedures. That argument is meritless, and the court of appeals correctly rejected it. Further review is not warranted.

1. Petitioner contends (Pet. 10-18) that the Department of Labor is required to use APA rulemaking procedures in computing the CPI, but that issue is not properly presented in this case. As the court of appeals ex-

plained, petitioner's obligation to file tax returns was based on 26 U.S.C. 6012 (2000 & Supp. V 2005), and that statute is not a rule that is subject to the APA. Pet. App. 7a. There is no requirement that the CPI be a separately enforceable "rule" in order for it to be incorporated by reference into Section 6012. *Id.* at 8a. Petitioner does not challenge the court's reasoning on this point, and it is fatal to his claim.

Moreover, even if the CPI were somehow "void" due to the Labor Department's failure to follow APA rulemaking procedures in issuing it, its invalidity would not benefit petitioner. Instead, a court would have to undertake a severability analysis. Since there is no question that it would be the intent of Congress to have the filing threshold calculated without an inflation adjustment rather than to have no filing requirement at all, that analysis would lead a court to sever the inflation-adjustment provision from Section 6012. Cf. *United States* v. *Booker*, 543 U.S. 220, 245 (2005). That would result in filing thresholds *lower* than the adjusted figures, so it would provide no help to petitioner. Nor does petitioner assert that *any* reasonable inflation adjustment could possibly exempt his entire income from tax.

2. Petitioner asserts (Pet. 14-18) that the decision below conflicts with *Alaniz* v. *OPM*, 728 F.2d 1460 (Fed. Cir. 1984), and *Batterton* v. *Marshall*, 648 F.2d 694 (D.C. Cir. 1980). Petitioner is incorrect. Both of those cases involved changes to the methodology of calculating statistics that in turn were used in grant-making and salary-computation decisions, and the courts held that the changes required notice-and-comment rulemaking. Neither decision suggested that the statistics themselves had to be issued through rulemaking. Such a holding would be inconsistent with the plain language of

the APA, which defines a "rule" as an agency statement "designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency," 5 U.S.C. 551(4)—a definition that does not include statistics like the CPI.*

Petitioner suggests in passing (Pet. 18) that the decision below conflicts with *Christensen* v. *Harris County*, 529 U.S. 576 (2000), "by giving to a number calculated by the [Department of Labor] and published only on the Internet and in a few financial newspapers and periodicals the force and effect of law." But as already explained, the decision below does not rest on a determination that the CPI, in and of itself, has the force of law. What has the force of law is Section 6012, and it is that statute that required petitioner to file a tax return.

---

* Petitioner relies on *Phillips Petroleum Co.* v. *Johnson*, 22 F.3d 616, 621 (5th Cir.), modified on reh'g, 36 F.3d 89 (5th Cir. 1994), cert. denied, 514 U.S. 1092 (1995), but that case also involved the methodology for calculating statistics, not the statistics themselves. Pet. 18 n.5. In any event, even if the decision below were somehow inconsistent with *Phillips Petroleum*, such an intra-circuit conflict would not warrant this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General
NATHAN J. HOCHMAN
Assistant Attorney General
ALAN HECHTKOPF
KAREN QUESNEL
S. ROBERT LYONS
Attorneys

MARCH 2008